from the correspondence. Neither do I consider, with respect, that he was right in his finding that there was no evidence the vendor protested against such a method of payment. For myself I read the letters of February 26 and March 19 as requiring payment in cash, as stipulated in the agreement.

In my respectful view, the question is to be decided as a matter of construction. And on a proper construction, the purchasers must be held to have contracted to pay the balance of the purchase money to the stakeholders in cash. The purchasers knew from the terms of the contract that the vendor required the purchase money to effect the discharge of the charge on the property and to deduce a good title. It was of some considerable importance to the vendor that he should have the money; a mere promise of money was not sufficient for his purpose.

In the matter of tender, as was said in *Beeves & Anor.* v. *Mason*[6] (reported in the London *Times* of July 19, 1978), a case on the tender of rents, on general principles, the landlord (or in a sale, the vendor) should have the rent (or the purchase money) in cash in his hands by the due date. That requirement might, however, be waived by express arrangements or by necessary implication, where the facts were sufficiently strong to establish that the landlord had shown that he was content to accept payment by cheque posted by the due date of payment. Inferences of that nature were not to be too readily drawn, but where the facts supported them clearly and emphatically they were not to be dismissed. But in the absence of such arrangement or of evidence from which an inference to this effect can be drawn, the form of tender must be as agreed in the contract.

I regret therefore being unable to agree with the learned judge that merely accepting the copy of the letter of March 10, 1975 from the lenders to the purchasers was acceptance of the mode of payment and sufficient tender, in the absence of any evidence that the contents of the letter were explained to him and he had agreed. Further, apart from the fact that his then solicitor had at no time sufficiently or properly advised him, the vendor, that without his agreement, there was no tender as such, this finding did not take into consideration the vendor's letter of March 19. This letter in my view sufficiently disproved any suggestion that the vendor had consented to a variation in the mode of tender. The conclusion also failed to consider that the letter of March 10 was inferentially only an approval of an application for loan, subject to a good title being deduced. If a cheque is not a good tender with its definite instructions to the banker to pay on presentation, *a fortiori*, a conditional approval of a loan would have less effect to discharge the purchasers' obligation.

It has not been argued that time was not of the essence, but if there is such an argument, the letter of March 19 making March 25 the final date for completion, in my view, was sufficient to require the purchasers to tender the balance of the purchase money by this date upon penalty of being found in breach of their obligation to complete: *Chintamanie Ajit* v. *Joseph Mootoo Sammy.*[7]

I would therefore allow the appeal. The claim of the purchasers (plaintiffs) stands dismissed with costs here and in the court below. The counterclaim is allowed also with costs in the agreed sum of $8,000.

Wan Suleiman F.J. concurred.

Appeal and counter-claim allowed.

Solicitors: *Baharuddin, Bernatt, Tan & Ker; Ranjit, Thomas & Kula.*

TUCK SENG LOONG TRANSPORT CO. SDN. BHD. v. LATCHAMAN SINGH

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.JJ.) March 21 and September 30, 1978]
[Kuala Lumpur — Federal Court Civil Appeal No. 89 of 1977]

Torts — Damages — Loss of future earnings — Loss of earning capacity — Interference by appeal court.

In this case the learned trial judge had awarded $16,000 to the respondent for loss of future earnings arising from injuries sustained by him in a road accident. The appellant appealed on the ground that what the learned trial judge held to be "loss of future earnings" should really be "loss of earning capacity."

Held, dismissing the appeal: (1) it was plain in this case that the learned trial judge had found that there was satisfactory evidence of future loss of earnings;

(2) in this case the appellate court had no reason to interfere with the award of damages made by the trial judge.

Cases referred to:-

(1) *Rasidin bin Partorjo* v. *Frederick Kiai* [1976] 2 M.L.J. 214.

(2) *Davies & Another* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601, 616, 617.

FEDERAL COURT.

N.A. Marjoribanks for the appellant.

Butuk Morris Edgar for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J.: The appellants were the respondents in the court below.

The appeal is against that portion of the learned judge's decision which relates to loss of future earnings, for which the award was $16,000.

Respondent was a lorry driver at the time when he was involved in an accident with the defendants' lorry on February 2, 1972. It is not disputed that he suffered severe injuries in the accident and had his right arm amputated. I need not set out the other injuries which are irrelevant for the purposes of this appeal except for the one to his right leg. Both these injuries left him with a certain degree of residual or permanent disability.

Respondent had been a lorry driver for about 20 years and said he was no longer able to drive a motor lorry and was not able to obtain employment even as a watchman as a consequence of his injuries. At the date of hearing he was between 40 and 41 years old. He said that he was earning $250 as a lorry driver. Since the accident he had purchased cattle with financial help from relatives but he was only able

to act as a cowherd because his disability prevented him from milking them or cutting grass for cattle fodder. His children helped him to tend the cattle. He added that he could not get a job elsewhere as a cowherd because his weakened leg would not enable him to run after any cattle which might stray. Even when he put his own cattle to graze he had to be accompanied by his son.

From the sale of milk he obtained an income of $200 per month.

Mr. Marjoribanks for the appellants and Datuk Morris Edgar for the respondent both share the view that what the trial judge held to be "loss of future earnings" should really be "loss of earning capacity". Mr. Marjoribanks cited the decision of this court in *Rasidin bin Partorjo* v. *Frederick Kiai*[1] wherein this court cited with approval a passage which appears in *Kemp & Kemp* 4th Edition at pages 121 and 122 which reads:

"There must be evidence on which the court can find that the plaintiff will suffer future loss of earnings, it cannot act on mere speculation. If there is no satisfactory evidence of future loss of earnings, but the court is satisfied that the plaintiff has suffered a loss of earning capacity, it will award him damages for his loss of capacity as part of the general damages for disability and not as compensation for future loss of earnings."

However it is plain that the learned trial judge found that there was satisfactory evidence of future loss of earnings. He found that on the evidence the loss was at the rate of $150 per month, and took as a multiplier the figure of 12, reasoning that at the age of 40-41 respondent had a working life as a lorry driver of between 15 and 20 years. He had halved the monthly income of the respondent from his cattle because he found that that sum was family income and not that of the respondent alone. With respect I am inclined to agree with the learned judge that this is a case where there is indeed satisfactory evidence of loss of future earnings and there is no need for the court to resort to "plucking a figure from the air".

Bearing in mind the principle upon which an appellate court will interfere with the award of damage made by a judge sitting alone as enunciated by Lord Wright in *Davies & Anor.* v. *Powell Duffryn Associated Collieries, Limited,*[2] I do not think I should interfere with the award though I myself might not have taken a multiplier as large as 12. The appeal is therefore dismissed with costs.

Lee Hun Hoe C.J. (Borneo) and **Chang Min Tat F.J.** concurred.

Appeal dismissed.

Solicitors: *Lovelace & Hastings; Morris Edgar & Co.*

LOW KUM YOON v. TEH KIM HUAH

[O.C.J. (Arulanandom J.) July 5, 6 and September 26, 1977]
[Penang — Originating Summons No. 303 of 1977]

Landlord and Tenant — Controlled premises — Expiry of lease — Tenant holding over — Premises decontrolled by effluxion of time — Effect of — Whether notice to quit necessary to determine tenancy — Control of Rent Act, 1966, s. 23(1) — Specific Relief Act 1950, s. 8 — R.S.C. 1957, O. 54.

Practice and Procedure — Declaratory judgment — Power to make — Exercise of discretion — Issue of title.

By an agreement in writing dated January 1, 1973 the defendant, as chief tenant let out the premises to the plaintiff for a fixed term of three years from January 1, 1973 to December 31, 1975 at a daily rental of $10 to be paid daily. On December 17, 1975 the defendant wrote to the plaintiff that the lease for a fixed term would be expiring on December 31, 1975, and requesting the plaintiff to quit and deliver vacant possession of the demised premises on December 31, 1975. The plaintiff failed to comply with the request to quit as he had been advised that as the premises were under the purview of the Control of Rent Act 1966 he was protected. On January 13, 1976 the plaintiff applied to have the premises decontrolled by effluxion of time in accordance with the written agreement between the parties. On April 2, 1977, the Chairman for the Rent Tribunal issued a certificate certifying that pursuant to section 23 of the Control of Rent Act 1966 the tenancy of the said premises had been duly delivered and that on the service of a copy of the said certificate on the plaintiff the said premises were decontrolled. The certificate was duly delivered on the defendant and on May 19, 1977 the defendant took possession of the said premises. The plaintiff applied for a declaration that although the said premises were decontrolled, he was still the lawful sub-tenant and was entitled to possession of the demised premises.

Held: (1) once premises under the purview of the Act were decontrolled, the premises reverted to the state of non-controlled premises and the ordinary common law relating to landlord and tenant would apply. Hence, the tenant's right to remain on the premises having been determined by the expiry of the period of his lease, he was not in a position to demand a lawful notice to quit to determine his tenancy as his lease had already been determined;

(2) the concept of statutory tenancy which existed in the Control of Rent Ordinance of 1948 and 1956 had disappeared from the Control of Rent Act of 1966. The deletion of the provisions regarding statutory tenancy left a tenant who held over after the determination of his tenancy by effluxion of time with no protection whatsoever when the certificate decontrolling the demised premises was served on him;

(3) after the determination of the tenancy any act of the landlord showing an intention to take possession was sufficient to revest possession in him so that the tenant became a respasser;

(4) the power to make declaratory judgments was a discretionary one which should be exercised with care and caution and granted sparingly and judicially with regard to all the circumstances of the case. The court would not make a declaratory judgment where the question raised was purely academic or where the purpose of seeking a declaration was to cause delay;

(5) the plaintiff was not entitled to the declaration that he sought as not only did the circumstances not warrant the exercise of discretion in his favour but to declare he was the lawful sub-tenant would be contrary to law. Section 8 of the Specific Relief Act only referred to possession and did not deal with issues of title.

Cases referred to:-

(1) *Henderson* v. *Squire* (1869) L.R. 4 Q.B. 170, 172.

(2) *Howard* v. *Pickford Tool Co. Ltd.* [1951] 1 K.B. 417, C.A.

(3) *Vine* v. *National Dock Labour Board* [1956] 1 All E.R. 1, 8, 13.

(4) *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.* [1971] 1 M.L.J. 118, 121.

ORIGINATING SUMMONS.

Tan Boon Im for the applicant.

Gan Teik Chee for the respondent.

Cur. Adv. Vult.

Arulanandom J.: This is an application by the plaintiff: —